



Submission by the  
ACT Ombudsman

**SELECT COMMITTEE ON AN INDEPENDENT  
INTEGRITY COMMISSION**

INQUIRY

Submission by ACT Ombudsman, Michael Manthorpe PSM

**June 2017**



## INTRODUCTION AND SUMMARY

I welcome the opportunity to make a submission to the Inquiry into an Independent Integrity Commission (the Inquiry) and measures to ensure the ACT can detect, monitor and respond to corruption risks.

The Select Committee on an Independent Integrity Commission (the Committee) 'Issues Paper – Australian Public Sector Integrity Framework' (Issues Paper) identifies the existing integrity framework for the ACT public sector and Legislative Assembly. However, it is noted that the Issues Paper does not include an analysis of corruption risk in the ACT or an assessment of the current integrity framework as it relates to corruption.

I encourage the Committee to explore the relationships between existing integrity bodies in the ACT and the proposed commission. If established, an independent integrity commission should work with and complement existing oversight mechanisms. I agree with the Committee that adopting a model from another jurisdiction may not result in the best design for the ACT's unique context.

This submission asks the Committee to consider:

- conducting an in-depth analysis of the integrity system in the ACT to identify opportunities for corruption and effective counter responses
- reviewing submissions to the Australian Senate's Select Committee on National Integrity Commission<sup>1</sup> inquiry and consider models, such as:
  - a council model over a commission
  - contracting services from the Commonwealth, in the event that a National Integrity Commission is established
- further consultation with my office and other relevant integrity bodies once a draft model, or specific proposal for a draft model, has been developed
- inter-agency relationships, including the exchange of information and the referral of complaints
- the discretion of my office when deciding whether or not to investigate referred matters
- oversight and accountability mechanisms for a new integrity commission as part of the framework for the proposed model.

The submission also provides the Committee with a summary of external oversight mechanisms for integrity commissions/anti-corruption agencies in other Australian jurisdictions (Attachment A).

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<sup>1</sup> Available at:

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/National\\_Integrity\\_Commission/IntegrityCommissionSen](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/National_Integrity_Commission/IntegrityCommissionSen)

# ROLE OF THE OMBUDSMAN AND RELATIONSHIP WITH AN INTEGRITY COMMISSION

The ACT Ombudsman safeguards the community in its dealings with ACT Government agencies by:

- assisting people to resolve complaints about ACT Government administrative actions and conducting independent investigations, as appropriate
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- developing policies and principles for accountability.

The Commonwealth Ombudsman is also the ACT Ombudsman under an arrangement between the ACT Government and the Australian Government. The Commonwealth Ombudsman is responsible for reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers. The ACT Ombudsman has similar responsibility for inspecting the records of ACT Policing in relation to the administration of the Child Sex Offenders Register and use of certain covert and intrusive powers<sup>2</sup> under ACT legislation.

While ombudsman offices and integrity commissions work toward the shared goals of transparency, integrity and accountability of the public sector, the manner in which the two entities operate is different. One is tasked at ensuring fairness and sound administrative practice and the other is concerned with ethical behaviours and uncovering corruption.

Ombudsman investigations are predominantly informed by complaints from the public. Conversely, as corruption usually requires the complicity of the parties involved, the investigations of an integrity commission are unlikely to be informed by complaints from the public as a general rule.

An integrity commission typically has significant coercive and covert powers to uncover corruption. While the powers of the Ombudsman under *the Ombudsman Act 1989* (ACT) include the power to compel the giving of information during investigations and to require witnesses to appear and take evidence under oath, these are seldom used. The Ombudsman's office prefers to work collaboratively with the agencies we oversight to facilitate the exchange of information and achieve improvements in public administration.

The Ombudsman's capacity to influence agencies through practical and constructive feedback depends on building a relationship of trust and respect. Natural justice principles always apply to Ombudsman investigations whereas an anti-corruption investigation may require a more covert approach.

There is the potential for the work of an integrity commission and Ombudsman office to be complementary. However, the approach of each will differ significantly.

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<sup>2</sup> These include powers to conduct controlled operations and use assumed identities and surveillance devices.

## DEFINING THE GAPS IN INTEGRITY AND OVERSIGHT

Identifying the key objectives of the proposed integrity commission would assist in developing an appropriately targeted mechanism and subsequently an ability to measure its effectiveness.

The models of integrity commission considered for the ACT should respond to the underlying anti-corruption and ethical issues in the jurisdiction, including identifying the gaps in the current framework. If an integrity commission is the 'solution', it must be effective in addressing the 'problem'.

Questions that the Committee may like to consider include:

- Are there gaps in the current integrity framework and is an integrity commission the best way to fill them?
- Whether the integrity commission is to address issues of existing corruption, the perception of corruption or is it to prevent corruption from occurring?
- Where is corruption likely to occur in the ACT? Are there key areas of risk or opportunities for corruption?
- Is the purpose of an integrity commission to target corruption in the public service, MLAs and/or political parties? Are the most effective mechanisms to address these the same?

The Committee may find the work of anti-corruption and public policy researcher, Professor Adam Graycar<sup>3</sup>, provides useful guidance in this analysis. Professor Graycar considers that effective corruption control is contingent on understanding the systemic and localised opportunities for corruption.<sup>4</sup> I draw the Committee's attention to his framework for the analysis of corruption which identifies types, activities, sectors and places (TASP) and his view that:

With the TASP framework identified or suspected corruption in any setting can be analysed as a precursor to the controls and processes that are most appropriate for the control and modification of corrupt behaviour, which ideally can enhance public sector performance (2015)<sup>5</sup>.

Professor Graycar also suggests that a clear understanding of the nature of the corruption or suspected corruption is a requirement for subsequently measuring the effectiveness of these mechanisms.

Transparency International<sup>6</sup>(TI) has also developed and published numerous methodologies for the analysis of integrity systems. These are all available on TI's website in the form of Integrity System Assessment Toolkits.

I suggest the Committee consider undertaking a comprehensive assessment of the ACT's anti-corruption systems to ensure that mechanisms, current and proposed, comprise the most appropriate mitigating framework.

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<sup>3</sup> Professor Adam Graycar, Director of the Transnational Research Institute on Corruption

<sup>4</sup> Graycar, A. and Sidebottom, A. (2012), 'Corruption and control: a corruption reduction approach', *Journal of Financial Crime*, Vol. 19 Iss: 4 p. 384 – 399. Available at: [https://openresearch-repository.anu.edu.au/bitstream/1885/58147/9/01\\_Graycar\\_Corruption\\_and\\_Control\\_2012.pdf](https://openresearch-repository.anu.edu.au/bitstream/1885/58147/9/01_Graycar_Corruption_and_Control_2012.pdf)

<sup>5</sup> Graycar, A. (2015), 'Corruption: Classification and analysis', *Policy and Society* 34, p. 87-96. Available at: <http://www.tandfonline.com/doi/pdf/10.1016/j.polsoc.2015.04.001>

<sup>6</sup> Transparency International: the global coalition against corruption: <https://www.transparency.org/>

## JURISDICTION AND REFERRAL OF MATTERS BETWEEN ENTITIES

It is reasonable to assume that the administrative actions of an integrity commission would fall within my office's jurisdiction, as it does in the case of the Tasmanian Integrity Commission and Ombudsman<sup>7</sup>. Likewise, I and relevant staff within my office would fall within scope of an integrity commission.

I note the articulation of roles and jurisdiction in the 'ACT Public Sector and Parliamentary Integrity Framework' map at figure 2.2 of the Committee's Issues Paper. Further to the identification of the mechanisms in this map, I make the following comments:

- *Inter-agency referrals*  
Of particular interest to my office is the potential for inter-agency referrals. We suggest that the ability to refer matters to other agencies, including the Ombudsman's office be considered by the Committee, noting that it is essential that the Ombudsman retains discretion in choosing whether or not to investigate a referral.
- *Public Interest Disclosure*  
The interaction between the *Public Interest Disclosure Act 2012* and any legislation establishing a new integrity body needs to be addressed.
- *Judicial officer oversight*  
The map at figure 2.2 does not include reference to the recently established ACT Judicial Council.

I suggest that in the drafting of any legislation, consideration is given to ensuring explicit provision for the exchange of information, the referral of complaints and the development of inter-agency arrangements, such as memoranda of understanding. It is also essential that a framework be established for regular communication between integrity bodies wherein issues of inter-agency referrals, information exchange and jurisdictional overlap can be discussed.

## ACCOUNTABILITY

The greater the powers afforded to an anti-corruption/integrity body, the greater the need for effective oversight. I suggest the Committee consider how to integrate appropriate accountability mechanisms in the framework for any new integrity body.

As highlighted by Brown and Head's paper (2004)<sup>8</sup> one aspect of designing an integrity body is the accountability of the integrity body itself. Whenever an independent body is created with powers, the exercise of which is capable of having a significant impact on the lives of individuals, the question of accountability must be addressed.

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<sup>7</sup> Connock, R. 3 March 2016. Submission to the Independent Review of the *Integrity Commission Act 2005 (Tas)*

<sup>8</sup>Brown, A.J. and Head, B. (2004) 'Ombudsman, Corruption Commission or Police Integrity Authority? Choices for Institutional Capacity in Australia's Integrity Systems', Paper presented to the *Australasian Political Studies Association Conference*, University of Adelaide, 29 September to 1 October 2004, p. 21

All anti-corruption bodies in Australia are subject to parliamentary oversight, although it is important to ensure that the jurisdiction and role of a standing committee is clearly articulated. For example, a standing committee should not be able to review a particular decision or investigation of an integrity commission nor should it be able to interfere with its day-to-day operation. To do so could compromise its independence, or the perception thereof.

While parliamentary oversight of the proposed integrity commission is key, so too is the establishment of specialised oversight where this is warranted by the nature of powers conferred upon that body.

The issue of addressing complaints about an integrity body should also to be considered in designing a model for an integrity commission. It is essential that the framework for managing complaints about the proposed integrity body is clearly articulated, noting that this is not the case for every one of the models reviewed by the Committee's Issues Paper ([Attachment A](#) refers).

To complement the Committee's Issues Paper, the external accountability measures in place for those state integrity bodies that were compared by that paper are summarised at [Attachment A](#) for the Committee's reference. This is of particular interest as it relates to oversight mechanisms in addition to parliamentary committees.

## **COMMONWEALTH OMBUDSMAN OVERSIGHT OF COVERT AND INTRUSIVE POWERS**

The Commonwealth Ombudsman is responsible for overseeing approximately 20 law enforcement agencies, both Commonwealth and State and Territory, with respect to their use of certain covert and intrusive powers under federal legislation. The Commonwealth Ombudsman's role is to provide assurance that agencies are using their powers as Parliament intended, and if not, hold the agencies accountable to the Australian Government and the public. These agencies include:

- Australian Federal Police
- Australian Commission for Law Enforcement Integrity
- Qld Crime and Corruption Commission
- WA Crime and Corruption Commission
- Victorian Independent Broad-based Anti-corruption Commission

This oversight function includes conducting inspections through engaging with agencies, auditing relevant records and testing agencies' processes and systems. These inspections serve as an important community safeguard and assist agencies in applying sound administrative practices. The inspections are conducted under legislation including:

- *Telecommunications (Interception and Access) Act 1974 (Cth) (TIA Act)*
  - telecommunications interceptions
  - stored communications
  - telecommunications data

- *Surveillance Devices Act 2004* (Cth)
  - surveillance devices
- *Crimes Act 1917* (Cth)
  - controlled operations
  - monitoring of control orders
  - delayed notification search warrants
  - preventative detention orders.

As the ACT Ombudsman function is contracted from the Commonwealth and performed from within the office of the Commonwealth Ombudsman, the ACT Government may wish to consider utilising the office's expertise in the oversight of covert and intrusive powers. This involvement may take the form of provision of advice regarding the establishment of an accountability framework for the use of like powers, legislated oversight of relevant powers or a combination of the two.

If an integrity commission is developed in the ACT, it may, as did the Tasmania Integrity Commission in 2017, request that the Commonwealth amend the *Telecommunications (Interception and Access) Act 1979* so as to grant it the status of a criminal law enforcement agency. In this case, it would fall within my jurisdiction as Commonwealth Ombudsman.

## INDEPENDENCE AND RESOURCING

Independence is a critical element in ensuring public confidence in an integrity body and independence is contingent on appropriate resourcing. It is widely agreed that a key component for the success of an integrity body is its resourcing, both in terms of its funding and appropriately trained and experienced personnel.

Corruption generally uses the power of existing structures for concealment. An integrity commission should have significant powers to address corruption at all levels, including covert and coercive powers if appropriate. However, it is important to note that the administration of such powers is expensive in terms of infrastructure, specialised personnel with sufficient skill sets and appropriate oversight.

In order to protect the independence of an integrity commission and the public perception of that independence, the work of that commission should not be hampered by a lack of resources. It must be in a position to respond to issues of possible corruption effectively and within a reasonable timeframe.

Decisions about whether or not to investigate should not be made on the basis of funding availability. It may be pertinent to provide budget flexibility (as proposed by Mr Brian Martin AO QC in his Report on the establishment of an Anti-Corruption, Integrity and Misconduct Commission for the Northern Territory<sup>9</sup>) given the workload of a new integrity body is impossible to predict with any confidence, especially in the years post establishment. It may also be appropriate to afford the head of the proposed integrity commission the discretion to expend resources to pursue a particular investigation above and beyond annual budgetary allocation, where it is in the public interest do so.

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<sup>9</sup> Martin, B. (2016) Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report – May 2016. Available at: <https://acimcinquiry.nt.gov.au/?a=292252>

## **AN ALTERNATIVE**

On 8 February 2017 the Australian Senate established the Select Committee on a National Integrity Commission to inquire into whether a national integrity commission should be established to address institutional, organisational, political and electoral, and individual corruption and misconduct (the federal inquiry). The Select Committee's report is due by 15 August 2017.

In the event that the Australian Government does establish a National Integrity Commission, it is open to the ACT Government to explore an arrangement with the Commonwealth Government for the provision of relevant services to the ACT jurisdiction.

# SUMMARY OF EXTERNAL ACCOUNTABILITY MECHANISMS OF DESIGNATED INTEGRITY BODIES IN AUSTRALIA

The Select Committee on an Independent Integrity Commission undertook a comparative analysis of the legislative frameworks governing the following entities in its Issues Paper – Australian Public Sector Integrity Frameworks’, released in March 2017.

By way of assistance, we have similarly outlined the external accountability mechanisms of the same integrity frameworks.

The following information has been sourced from the respective websites of each integrity body.

### ***NSW Independent Commission Against Corruption***

The NSW Independent Commission Against Corruption (ICAC) is primarily accountable through the NSW Parliament’s Committee on the ICAC and the Inspector of the Independent Commission Against Corruption (the Inspector of the ICAC).

#### *The Inspector of the ICAC*

The Inspector is an independent statutory officer of NSW whose role and function is to hold the ICAC accountable in the way it carries out its function.

The Inspector oversees ICAC by:

- undertaking audits of the ICAC’s operations to ensure compliance with the law
- dealing with complaints about the conduct of the ICAC and current and former officers
- assessing the effectiveness and appropriateness of the ICAC's procedures.

The Inspector has extensive powers to investigate the conduct of the ICAC and its officers, including obtaining documents from the ICAC and requiring ICAC officers to attend before him and answer questions. The Inspector can also sit as a Royal Commissioner in order to conduct investigations. As a Royal Commissioner the Inspector has extensive powers to compel witnesses to provide evidence.

The ICAC is also externally accountable for its work through:

- accounting to the NSW Treasury and Auditor General for the proper expenditure of funds
- inspection by the NSW Ombudsman of records of telecommunications interceptions, controlled operations and the use of surveillance devices
- reporting to the NSW Attorney General and the judge who issued the warrant for each surveillance device
- compliance with access to information and privacy laws, with exemption for certain operational matters
- requirements for annual reporting, including those in the ICAC Act.

## ***Queensland Crime and Corruption Commission***

The Queensland Crime and Corruption Commission (CCC) is subject to a range of accountability measures, both internal and external. These include the following external measures:

### *The Parliamentary Crime and Corruption Committee (PCCC):*

- The PCCC is an all-party parliamentary committee that oversees the CCC's performance and activities and deals with complaints against it.
- The CCC reports to the PCCC every two months by means of both public and confidential reports, and discussions.
- Complaints alleging improper conduct by the CCC or a CCC staff member are dealt with by the PCCC.

### *Queensland's Attorney-General and Minister for Justice, Minister for Training and Skills:*

- The Attorney-General is responsible for the allocation of the CCC budget
- The CCC reports to the Attorney-General on its efficiency, effectiveness, economy and timeliness.

### *The Supreme Court of Queensland*

- The CCC must apply to the Supreme Court of Queensland before exercising some of its powers.
- The Court also reviews some CCC decisions and decides contempt of court matters in relation to CCC hearings.

### *The Public Interest Monitor*

- The Public Interest Monitor monitors CCC compliance with key legislation, including examining the CCC's applications for search warrants and surveillance warrants.

## ***West Australia Corruption and Crime Commission***

The WA Corruption and Crime Commission (CCC) is subject to oversight by the Joint Standing Committee on the Corruption and Crime Commission and by the Parliamentary Inspector of the CCC.

The Joint Standing Committee on the CCC is principally tasked with monitoring and reporting to Parliament on the exercise of the functions of the CCC and the Parliamentary Inspector of the Commission.

The Office of the Parliamentary Inspector assesses and investigates complaints about the actions and decisions of the Corruption and Crime Commission.

The Office of the Parliamentary Inspector also makes recommendations to the Corruption and Crime Commission, independent agencies, appropriate authorities and reports and makes recommendations to Parliament and Standing Committees.

## ***Tasmania Integrity Commission***

The Tasmania Integrity Commission (IC) is accountable to Parliament through the Joint Standing Committee on Integrity (the Committee), established under the *Integrity Commission Act 2009*.

While the Committee can refer matters to the Commission for investigation or advice, it may not involve itself in any complaints or investigations arising from complaints dealt with by the Commission.

Additionally, the *Integrity Commission Act 2009* (Tas) required that an independent, one-off review be conducted after five years (May 2016). Also under that Act, the Joint Standing Committee was required to submit a review of the functions, powers and operations of the IC after three years of operation.

There does not appear to be any explicit mechanism for making complaints about the conduct of the IC or its employees.

### ***Victoria Independent Broad-based Anti-corruption Commission***

The Victorian Independent Broad-based Anti-corruption Commission (IBAC) is subject to scrutiny by various federal and state bodies, including:

- *The Victorian Inspectorate*
  - monitors compliance with the *Independent Broad-based Anti-corruption Commission Act 2012* (Vic) and other laws
  - oversees IBAC performance under the Protected Disclosures Act 2012 (Vic)
  - receives and investigates complaints about IBAC
- *The IBAC Parliamentary Committee* – monitors and review performance and functions and examines reports published by IBAC
- *Commonwealth Ombudsman* – inspects IBAC’s use of stored communications warrants
- Commonwealth Attorney-General – receives reports on IBAC’s telecommunications interception and stored communications warrants
- *Supreme Court and Magistrates’ Court* – receive reports on IBAC surveillance device warrants
- *Public Interest Monitor* – reviews IBAC applications for surveillance device and telecommunications interception warrants
- *Victorian Attorney-General* – receives reports on:
  - telecommunications interception warrants
  - surveillance device warrants
  - assumed identities
- *Special Minister of State* – receives reports on telecommunications interception warrants.

### ***SA Independent Commission Against Corruption***

The South Australia Independent Commission Against Corruption (ICAC) is subject to an annual review of the exercise of its powers. The person conducting the review must consider whether the powers under the *Independent Commissioner Against Corruption Act 2012* (SA) were exercised in an appropriate manner. The Reviewer presents an annual report to the Attorney-General, who tables the report in each House of Parliament.

The ICAC is also subject to the oversight of the Parliamentary Crime and Public Integrity Committee.